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In the Supreme Court of the United States

October Term, 1964

No. 542

ANTHONY GIANFRANCESCO, Petitioner

vs.

THE STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.
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ANTHONY GIANFRANCESCO, Petitioner

vs.

THE STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on June 3rd, 1964, Motion for Rehearing being denied on the 1st day of July, 1964.

CITATION TO OPINIONS BELOW

The trial court issued no written opinion; the Court of Appeals, Seventh Judicial District, State of Ohio, and the Supreme Court of the State of Ohio issued no written opinion, but merely journalized their entry, sustaining the court below. (See Appendix B, pages 18-22.) These decisions are unreported.

JURISDICTION

A judgment of the Supreme Court of Ohio was entered on June 3, 1964; a timely motion for rehearing was filed, which was denied by the Supreme Court of the State of Ohio on the 1st day of July, 1964. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since a question of the constitutional rights of the Petitioner under Amendments IV, V, and XIV of the Constitution of the United States were raised by objection to the admission of certain evidence and exhibits in the trial court and were further raised by Assignments of Error and brief

through the appeals court, Seventh Judicial District, State of Ohio, and the Supreme Court of the State of Ohio—both courts holding that there was no error prejudicial to the Petitioner and that no substantial constitutional question existed.

QUESTIONS PRESENTED

(1) Whether the trial court violated the constitutional rights of the Petitioner as protected by Amendments IV, V, and XIV of the Constitution of the United States by permitting the State to admit certain exhibits obtained by police officers in searching Petitioner's car and other cars out of the presence of the Petitioner, and evidence that the Petitioner possessed a federal gambling stamp.

(2) Whether the constitutional rights of Petitioner as protected by Amendment XIV of the Constitution of the United States have been violated, where the trial court, after submitting the case to the jury at the close of all the evidence, failed to dismiss two alternate jurors, as prescribed by a mandatory statute of the State of Ohio, i.e., Revised Code, Section 2313.37; and further, by permitting said two alternate jurors, after the twelve jurors had been deliberating for approximately two hours, to accompany the twelve jurors to dinner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Fourteenth (Section 1) Amendments of the Constitution of the United States, and Article I, Section Five and Section Ten of the Constitution of the State of Ohio; and the statutory sections referred to and involved are:

Section 2915.12,
Section 2915.13,
Section 2313.37

of the Revised Code, State of Ohio; and 26 U. S. C. A., Chapter 35, Sections 4401, 4411 and 4412. They are printed in Appendix A, pages 13-17.

STATEMENT

On the 5th day of October, 1962, the Petitioner was arrested without warrant at gunpoint, together with three other individuals, in a parking area immediately to the south of the front entrance of the North Side Unit of The Youngstown Hospital Association—said parking area being used by many persons in going to and from said hospital.

The three other individuals arrested at such time and place, to-wit: R. J. Manuel, William Baker, and Joseph Mosco, subsequent to their arrest plead guilty to a violation of the Revised Code of the State of Ohio, Section 2915.12 (Appendix A, page 15), as a misdemeanor, and were sentenced to thirty days in county jail and required to pay a fine of Five Hundred Dollars ($500.00). Approximately twenty to twenty-five minutes following the arrest of the Petitioner and the three individuals referred to above (R. 43) (Appendix C, page 23) three other individuals were arrested on Goleta Avenue, which is the first street to the east of the North Side Unit of The Youngstown Hospital Association, and is some distance from where the original arrest took place.

The three individuals arrested on Goleta Avenue were Pat Bostic, George Economus and Fred Taddei. Mr. Bostic, subsequent to this arrest, plead guilty to a charge of violating Revised Code of the State of Ohio, Section 2915.12, as a misdemeanor and received a sentence of thirty days in the county jail and Five Hundred Dollars ($500.00) fine. Mr. Economus and Mr. Taddei were subsequently released without charge.

The arrests made had been planned by the Police Department of the City of Youngstown, Mahoning County, Ohio, for some time. On October 5, 1962, seven police officers were "planted" in various locations around the parking area at the North Side Hospital. Officer Dan Maggianetti was in charge of the stakeout. In spite of

the fact that this was a planned arrest, Officer Maggianetti, who was in charge, failed to obtain any arrest warrants or search warrants. (R. 44-45) (Appendix C, page 23).

At the time of Petitioner's arrest, he was immediately taken from the scene of said arrest to a police cruiser which had been parked in front of the Nurses' Home, some distance away from the place of arrest, (R. 191-195) (Appendix C, pages 26-27) and a search was made of Petitioner's automobile and other automobiles which were at the scene of the arrest, and this search was conducted out of the presence of said Petitioner. (R. 211) (Appendix C, page 28). Further, the subsequent arrest and evidence obtained by a search were out of the presence of said Petitioner.

On April 18, 1963, the Petitioner was indicted by the Trumbull County Grand Jury for violation of Revised Code of the State of Ohio, Section 2915.13 (Appendix A, page 16), charging, in substance, that he "did unlawfully carry on a scheme of chance known as 'policy', 'numbers game', or 'clearing house', in violation of said section." Petitioner entered a plea of not guilty to said charge. On June 4, 1963, trial was commenced.

During the trial of the case, objections were taken to the admission of exhibits which were obtained as a result of the search made of Petitioner's car and other cars at the scene (R. 269-272) (Appendix C, page 28), and also, objections were taken to the admission of evidence that Petitioner was the owner of a federal gambling stamp. (R. 366-367) (Appendix C, page 30).

At the close of the submission of evidence on June 6, 1963, the trial court failed and neglected to discharge two alternate jurors, as required by a mandatory statute, Revised Code of Ohio, Section 2313.37. (Appendix A, page 14). The trial court also permitted these two alternate jurors to accompany the twelve jurors, who had been deliberating the case for approximately two hours, to dinner. (R. 382-384) (Appendix C, page 31).

On June 6, 1963, Petitioner was found guilty by the jury and sentenced to pay a fine of Five Hundred Dollars ($500.00) and costs, and sentenced to the Ohio Penitentiary for a period of from one to ten years. Execution of sentence was suspended pending appeal. Petitioner's Motion for New Trial was overruled, and the Court of Appeals, Seventh Judicial District, State of Ohio, and the Supreme Court of Ohio upheld said conviction, stating that there was no error prejudicial to the rights of the Petitioner and that there was no constitutional question involved:

REASONS FOR GRANTING WRIT

1. The following exhibits were offered and admitted by the trial court on behalf of the State in the prosecution of the Petitioner: State's Exhibits 1, 19, 20, 21, 22, 23, 24, 25 and 26, which were, supposedly, items and paraphernalia used by persons engaged in writing numbers. The arrests were without benefit of an arrest warrant and the exhibits were secured by the police officers without benefit of a search warrant, and said search of various automobiles were made out of the presence of the Petitioner who, immediately after the arrest, had been taken away to a police cruiser a considerable distance away from the place of the arrest.

The last exhibit offered by the State (Exhibit 27) on objection, was excluded by the trial court (R. 269-272) (Appendix C, page 28), reasoning that evidence obtained as a result of the arrest and search on Goleta Avenue was too remote to be admissable against Petitioner, but over objection, stated that all other evidence and exhibits were proper.

It seems clear that the trial court considered all other exhibits offered by the State to be relevant and competent and any further objection on behalf of counsel for the Petitioner would seem to be unnecessary.

In a recent decision, March 23, 1964, by this Court in the case of **John Brenton Preston, Petitioner, vs. United States,** found in 11 L. Ed. 2d, 777, in an opinion written by Justice Black, which was unanimously supported, syllabus 1 states:

"A search of an automobile by state officers after the arrest for vagrancy of those sitting in the car, their removal to police headquarters, and the taking of the car to a garage, is too remote in time and place to be incidental to the arrest and when undertaken without a search warrant violates the test of reasonableness under the Fourth Amendment and renders inadmissable in the federal bank robbery prosecution the evidence obtained as a result of the search."

Syllabus 3:

"Searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissable."

Syllabus 8:

"The justification for permitting the search of an accused incident to lawful arrest are absent where search is remote in time or place from the arrest."

Although the facts in the Preston case are not identical with those in the present case, particularly as to the lapse of time from the making of the arrest and the search, there is no question that the Petitioner, after the arrest, was removed from the place of arrest and the search of his car, and other cars, was made out of his presence, and the principle as set out in the Preston case is applicable to the present case now before this Court.

Within a short period of time the police officers had arrested Petitioner and six other men. These men had been removed from the scene of the arrest and the search of the cars was made out of the presence of those arrested. Considerable evidence was gathered in the search of the vehicles. In a situation such as this, where there were so many arrests and so much evidence was obtained,

it leaves a wide discretion in the hands of the searching officer as to the exact location where various items were found. Not only does it leave too wide a discretion in the searching officer, or officers, but it permits too much room for honest mistake as to where various items are found, bearing in mind that four of the seven arrested plead guilty to a charge of gambling, and two men arrested were dismissed; and further, that none of the exhibits so offered were found on the person of the Petitioner (R. 186-187—Appendix C, page 25), it certainly leaves Petitioner at the mercy of the officer, or officers, conducting the search out of his presence.

2. Under the provisions of 26 U. S. C. A. (Internal Revenue Code), Chapter 35, Sections 4401-4411-4412 (Appendix A, pages 16-17), Petitioner registered and obtained a federal gambling stamp. During the trial of Petitioner (R. 366-368), (Appendix C, page 30), the fact that he had such gambling stamp was used as evidence against him in order to establish the State's case.

The use of such evidence against a defendant in a state court amounts, in substance, to entrapment and the method of obtaining such evidence is sufficiently shocking so as to violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Although the federal government does not authorize gambling under Chapter 35 of 26 U. S. C. A.—"Taxes on Wagers"—certainly gambling is not prohibited, so long as those accepting wagers register and pay their tax. So we have the federal government collecting a tax on wagers, and in this case the State of Ohio, by passage of R. C. 2915.13 (Appendix A, page 16), saying that gambling is illegal, and using the fact that Petitioner has a federal gambling-stamp as evidence to prove a violation of state law.

In the case of **Rochin vs. California,** 342 U. S., 165, 95 L. Ed., 183, 72 S. Ct., 205, the Supreme Court of the United States reversed a conviction which had been upheld by the District Court of Appeals, Second District of California, wherein evidence was obtained from the accused by causing the accused to vomit up morphine capsules which he had swallowed, and using the evidence so obtained to support a conviction. Although no physical violence was exerted on the Petitioner in this case as was true in the Rochin case, still it appears to be a subtle way of accomplishing the same result, and therefore should come under the same exclusionary rule.

The Rochin case (supra), syllabus 5, and the Opinion written by Frankfurter, J., at page 172, 342 U. S., states:

> "* * * It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Further on in the Opinion it states:

> "* * * Due process of law as a historic and generative principle precludes defining and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'. (Citing Mr. Chief Justice Hughes speaking for unanimous accord in Brown vs. Mississippi, 297 U. S. 278, 285, 286.)."

To argue that Petitioner voluntarily obtained a federal gambling stamp and is, therefore, precluded from raising the question seems to ignore the basic question of fairness. The federal government dangles the forbidden fruit in front of the Petitioner's nose, stating in substance, "You can gamble as long as you pay the federal tax." The State of Ohio disagrees, and says, "It is against the law to gamble," and uses the Petitioner's compliance with

federal law to convict him. By the terms of the Fourteenth Amendment of the Constitution of the United States (Appendix A, page 13), Petitioner is a citizen of both the United States and the State of Ohio. In an attempt to satisfy one, he displeases the other, and by so doing is deprived of his liberty. This, in the least, offends a sense of justice, and is a denial of due process.

In the case of **Talmadge Raley, Joseph Stern, Emmett Calvin Brown, Appellants vs. State of Ohio; Anna H. Morgan, Appellant vs. State of Ohio,** 360 U. S. 423, 3 L. Ed. 2d, 1344, 79 Supreme Court, 1257, Brennan, J., speaking for the Court, reversed as to all but one of the defendants, as involving denials of due process, since the persons convicted of contempt for refusing to answer certain questions before the Ohio Un-American Activities Commission had merely exercised a privilege which the State, through the legislative commission, had clearly told them was available. At pages 425 and 426 of 360 U. S., it is stated:

> "After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

The reasoning in the Raley case is applicable to Petitioner's case now before the Court.

(3) Article I, Section 5 and Section 10, of the Constitution of the State of Ohio (Appendix A, page 14), preserves to Petitioner the right to trial by jury and contemplates a jury of twelve as at common law.

See: **Work vs. State,** 2 O. S., 296;
State Ex Rel. Warner vs. Baer, et al., Judges, 103 O. S., 585.

Under the provisions of Revised Code, State of Ohio, Section 2313.37 (Appendix A, page 14), the trial court has authority to select alternate jurors, but said section specifically provides:

> "Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey an order or admonition of the court to the jury, shall receive the same compensation as other jurors and, except as provided in this section, shall be discharged upon the final submission of the case to the jury."

Two alternate jurors were selected during Petitioner's trial. At the close of all the evidence and upon final submission of the case to the jury (R. 382) (Appendix C, page 31), the trial court failed to discharge the two alternate jurors as required by the mandatory provisions of Revised Code of Ohio, Section 2313.37.

After the twelve original jurors had been deliberating on the case for approximately two hours (R. 382-384) (Appendix C, page 31), the trial court called them into the court room and permitted said jurors to go to dinner in charge of the bailiff, and at this time the trial court also permitted the two alternate jurors to go to dinner with the twelve original jurors who had been deliberating on the case.

The Court made no provision concerning the alternate jurors to the effect that they should remain in the custody of the bailiff during the deliberations of the twelve jurors, nor did he caution them or instruct them in any way as to their conduct and actions during deliberations of the twelve jurors.

The provisions of Revised Code, Section 2313.37 (Appendix A, page 14) are mandatory. During the two-hour period the two alternate jurors could have discussed the case with many persons and have formed opinions

other than on the evidence heard during the trial, and even though the Court admonished the jury during the dinner hour not to discuss the case, to permit these two alternate jurors to be present with the twelve jurors deliberating on the case is fraught with danger to the rights of the Petitioner to a fair and impartial trial, and is in violation of the protection afforded to him under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

In the case of **Harold D. Rogers, Petitioner, vs. Mark S. Richmond, Warden,** 365 U. S. 534, 5 L. Ed. (2d) 760, 81 Sup. Ct. 735, on a habeas corpus application made by the Petitioner in the United States District Court in the State of Connecticut, the District Court had denied relief and the Court of Appeals for the Second Circuit had affirmed. On certiorari the Supreme Court of the United States reversed and remanded the case to the Court of Appeals to be held in order to give the state an opportunity to retry Petitioner within a reasonable time.

This particular case involved the admission of a confession by the accused in the state court, and in Syllabus 7 of the case it was stated:

> "A defendant in a state criminal trial has the right to be tried according to the substantive and procedural due process requirement of the Fourteenth Amendment."

The act of the trial court in the instant case in permitting the two alternate jurors to accompany the twelve jurors to dinner violated both a substantive and procedural right guaranteed the Petitioner under the provisions of the XIV amendment of the Constitution of the United States.

In the case of **People of the State of New York, Respondents, vs. Donald Edward King, Appellant,** 216 N. Y.

Sup. 2d series 638, 13 A. D. 2d 264 in the reversal of a conviction of the defendant for first degree robbery, Syllabus 3 states:

> "Under no circumstances may more than twelve jurors participate in actual deliberations and alternate jurors may not be with regular jurors after deliberations have been commenced."

The trial court in this case had permitted two alternate jurors to go to lunch with the twelve regular jurors.

See also the case of **People vs. Britton, et al,** Supreme Court of California, 52 P. (2d), 217, the syllabus in the case states:

> "Presence of alternate juror in the jury room while jury was deliberating upon verdict held reversible error, notwithstanding instruction that while alternate juror might listen to deliberations, she was not to express any opinion or to participate therein."

In the case of **People vs. Bruneman,** District Court of Appeals, Second District, Division One, California, 40 P (2d) 891, Syllabus 3 states:

> "Presence in jury room during deliberations of jury in criminal case of alternate juror to whom case had not been submitted for deliberation held reversible error as invasion of right of jury trial, notwithstanding consent of defendant's attorney."

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

Edward L. Williams

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I

Section 5. Trial by Jury

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Section 10. Trial for Crimes; Witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

REVISED CODE—STATE OF OHIO

SECTION 2313.37 Duties of Alternate Juror

In the trial in the court of common pleas of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been impaneled and sworn,

an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected, but each party is entitled to two peremptory challenges as to such alternate juror. Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order of admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

REVISED CODE—STATE OF OHIO

SECTION 2915.12. Promoting Lottery or Scheme of Chance.

No person, for his own profit, shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a lottery or scheme of chance, by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value.

Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, each person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

SECTION 2915.13 Penalty for Promoting a "Numbers Game"

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

TAXES ON WAGERING

26 U. S. C. A., Chapter 35, Section 4401. Imposition of Tax

(a) Wagers. There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 per cent of the amount thereof.

(b) Amount of Wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager. the amount so collected shall be excluded.

(c) Persons Liable for Tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Chapter 35, Section 4411. Imposition of Tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Chapter 35, Section 4412. Registration

(a) Requirement. Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or Company. Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental Information. In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

APPENDIX B

COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
COUNTY OF TRUMBULL
NO. 1587

STATE OF OHIO Plaintiff-Appellee vs. ANTHONY GIANFRANCESCO Defendant-Appellant	**APPEAL ON QUESTION OF LAW FROM TRUMBULL COUNTY COMMON PLEAS COURT**

Date_____, 1963.

This cause came on to be heard on the appeal on question of law from the judgment of the Trumbull County Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Trumbull County Common Pleas Court is affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Trumbull County Common Pleas Court to carry this judgment into execution.

/s/ Paul W. Brown
Presiding Judge
/s/ James G. France
/s/ George M. Jones

Approved by:

/s/ Lynn B. Griffith, Jr.
Attorney for Plaintiff-Appellee

/s/ Jack W. Nybell by E. L. Williams
Attorney for Defendant-Appellant

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit: June 3, 1964

No. 38681

State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for TRUMBULL County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Edward L. Williams.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 13th day of July, 1964.

THOMAS L. STARTZMAN, Clerk
/s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit: June 3, 1964

State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 APPEAL FROM THE COURT OF APPEALS FOR TRUMBULL COUNTY

This cause, here on appeal as of right from the Court of Appeals for Trumbull County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Trumbull County for entry.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 13th day of July, 1964.

THOMAS L. STARTZMAN, Clerk
/s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit. June 3, 1964
State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Trumbull, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed for the reason that no substantial constitutional question exists herein.

THOMAS L. STARTZMAN,
Clerk
July 13, 1964

THOMAS L. STARTZMAN
/s/ Norman L. Myers, Deputy

RECORD OF COSTS

Docket Fee	$2.00	Paid by L. B. Griffith, Jr.
Docket Fee	$____	Paid by_____
Docket Fee	$____	Paid by_____
Printing Record . .	$____	Paid by_____
Supplemental Record	$____	Paid by_____
Sheriff's Costs . .	$____	Paid by_____
Sheriff's Costs . .	$____	Paid by_____

THE STATE OF OHIO } 1964 TERM
City of Columbus } To wit: Thur., July 16, 1964

State of Ohio
Plaintiff-Appellee
vs.
Anthony Gianfrancesco
Defendant-Appellant

NO. 38681

ENTRY

On written motion by counsel for appellant for a stay of execution of the judgment in the above case and having expressed his intention to perfect an appeal to The Supreme Court of the United States, it is ordered and adjudged therefore;

That execution of the judgment be, and the same hereby is, stayed until August 4, 1964, to enable appellant to apply to The Supreme Court of the United States for a stay of execution.

/s/ Kingsley Taft
KINGSLEY TAFT, CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 64, page 21.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 16th day of July, 1964.

Thomas L. Startzman, Clerk
By /s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM Wednesday, July 1, 1964
State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 46, Page 489.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th day of July, 1964.

Thomas L. Startzman, Clerk
By /s/ Norman L. Myers, Deputy

APPENDIX C

CROSS EXAMINATION OF OFFICER DAN MAGGIANETTI, JR.

Record. Page 43

Q. "You were there, Chief, from the time the surveillance operation or stakeout began?"

A. "That's right."

Q. "Until it was concluded, weren't you?"

A. "That's right."

Q. "You wouldn't leave an investigation of this size and importance in the middle, would you?"

A. "No Sir."

Q. "You were there from the start to the finish?"

A. "That's right."

Q. "And you were in complete charge from start to finish?"

A. "That's right."

Q. "I am asking you how much time, in your judgment, from the time Gianfrancesco was arrested until the time Economous was arrested?"

A. "That, I can't tell you exactly."

Q. "What is your best judgment?"

A. "Oh, I would say twenty or twenty-five minutes."

Record. Pages 44-45.

Q. "From the 1st to the 5th, inclusive, is a period of five days?"

A. "1st, 2nd, 4th, and 5th."

Q. "From the 1st to the 5th—from the time you commenced your operation or your surveillance, to the time of the arrest, five days elapsed?"

A. "That's right."

Q. "At any time during that five days, did you talk to any judge or magistrate about procuring a search warrant?"

A. "No, I didn't."

Q. "At any time during that five day period, did you talk to any Judge, Common Pleas Judge, Court of Appeals

Judge, County Court Judge, any mayor or magistrate, or any clerk in Trumbull County concerning the issuance of a warrant for the arrest of any of the men whom you had observed, in or about the North Side Hospital?"

A. "I did not."

Q. "You didn't get a warrant for a search for a person, or a warrant of search?"

A. "I did not."

CROSS EXAMINATION OF OFFICER PETER BUNYOFF

Record. Pages 169-170.

Q. "Well, Officer, of course, you know more about police terminology than I do, but when you pat a man down, you are looking for a weapon, and you are putting your hands on his person?"

A. "Yes sir."

Q. "And you are exploring his pockets?"

A. "No sir, I didn't."

Q. "You were patting his pockets?"

A. "Exploring and patting is different, sir."

Q. "At any rate, you are patting the man's body?"

A. "Yes sir."

Q. "Feeling under his armpits?"

A. "Yes sir."

Q. "Around his waist—around his belt?"

A. "Are you talking about this particular incident?"

BY MR. NYBELL: "I'LL WITHDRAW THE QUESTION."

Q. "At any rate, when you patted Gianfrancesco down, you didn't feel any bundle of money in his pockets, did you?"

A. "No sir."

Q. "And you didn't find any knife, did you?"

A. "No sir."

Q. "And you didn't find any gun, did you?"

A. "No sir. I had the shot gun in my hand. I could only pat him down with one hand."

Q. "On his person, you didn't find a knife, gun, or black jack, or a weapon of any description whatsoever?"

A. "No weapon I didn't find."

Q. "In the course of this patting down, you didn't feel anything that felt like a bundle of money?"

A. "I can't say that I did."

CROSS EXAMINATION OF OFFICER FRANCIS J. GALLAGHER

Record. Pages 186-187.

Q. "You didn't search the defendant or observe him being searched?"

A. "He was searched at the scene, and he was searched by the turnkeys in front of me upon being booked at the jail."

Q. "When he was searched in front of the turnkeys at the jail, nothing was found in his pockets as determined evidentiary?"

A. "Little amount of money."

Q. "All right. A Wallet?"

A. "I don't have the list. I would imagine."

Q. "There was nothing unusual found in his pockets in this search at the Police Station?"

A. "No sir."

Q. "There was no numbers slips or slips that may have been numbers slips found on his person at the scene that you witnessed?"

A. "No, I didn't see them take anything from him."

Q. "And those items, identified 19 through 22, were found on the front seat of Gianfrancesco's car, you don't know who put them there?"

A. "No, I was away from the car."

DIRECT EXAMINATION OF OFFICER ROBERT R. ZINS

Record. 191-192

Q "I see, and back on October 5, 1962, you were with the Intelligence and Security Division?"

A. "That's correct."

Q. "On October 5, 1962, were you out there at the North Side Hospital?"

A. "Yes, I was."

Q. "Would you tell us what role you played in that arrest in that raid?"

A. "Officer Donald Komara, Sam Vitt, and myself were stationed in an unmarked police car in the Nurses' driveway. That is just west of the circle in the hospital exit. When we got the word over the radio from Dan Maggianetti, we closed in, and I approached the exit of the driveway near Gypsy Lane and, at that time, Officer Gallagher had just pulled in front of R. J. Manuel's car—I believe that he is the owner of the car."

Q. "Yes."

A. "And the two subjects were getting out of the car. I handcuffed Manuel and took him over to where Gianfrancesco and Joe Mosco were standing."

Q. "Then after that, what happened?"

A. "We escorted all four of the subjects back to the unmarked car, where I guarded them. Donald Komara was with me. We escorted them back and left for the other phase of the operation."

Q. "After that, you stood guard on the subjects over here in the parking lot, is that right?"

A. "That's correct."

Q. "And that was your participation in that raid?"

A. "That's correct."

BY MR. GRIFFITH: "NO FURTHER QUESTIONS."

CROSS EXAMINATION OF OFFICER ROBERT R. ZINS.

Record. Pages 193-195

Q. "And it appears as though the Nurses' quarters are to the west of the central hospital area, is that correct?"

A. "That's correct."

Q. "So that between the driveway in front of the central hospital area and the Nurses' quarters, there appears to be a border of heavy shrubs and bushes of some type?"

A. "That's right. It is especially thick toward the hospital, but when you get to Gypsy Lane, it thins out."

Q. "Now, were you, Komara, and Vitt, parked in front of the Nurses' quarters?"

A. "Officer Vitt and myself were inside the car, and Komara was in the bushes near the hospital."

Q. "Was the car itself over here in this semi-circular driveway in front of the Nurses' quarters?"

A. "Yes, it was."

Q. "So that it would be difficult, if not impossible for you to see the flow of traffic and the movement inside the perimeter of that border of shrubs and bushes, is that right, Officer?"

A. "Yes, it is."

Q. "So this—from where you and Vitt were parked in front of the Nurses' quarters, you couldn't see Gianfrancesco's car?"

A. "That's correct, we could not."

Q. "And you couldn't see Mosco's car?"

A. "No."

Q. "Is that correct?"

A. "That's correct."

CROSS EXAMINATION OF OFFICER DONALD KOMARA

Record. Page 211

Q. "When you first saw them, they were all where?"

A. "In the street."

Q. "In the street, and this search that you made of Gianfrancesco's car was that made at the scene? I mean while the car was parked in the driveway of the North Side Hospital parking lot?"

A. "Yes, that is where it was made."

Q. "Was Mr. Gianfrancesco present when his car was searched?"

A. "No."

Q. "Was this after he had been taken to the station?"

A. "No."

Q. "About how far—where was Mr. Gianfrancesco at when you were searching his car?"

A. "He was in car 66, which was in the next driveway—the driveway of the Nurses' Home."

DIRECT EXAMINATION OF OFFICER THOMAS KELTY

Record. Pages 269-272

Q. "All right. Handing you State's Exhibit 27, can you identify those?"

BY MR. NYBELL: "SAME OBJECTION, YOUR HONOR."

BY THE COURT: "OVERRULED."

A. "These are number slips."

Q. "Handing you State's Exhibit 21, can you identify that?"

A. "These are number slips."

BY THE COURT: "I WOULD LIKE TO ASK A QUESTION. I WANT TO KNOW IF YOU WILL IDENTIFY THE SLIPS FOUND IN THE CAR ON GOLETA AVE."

BY MR. NYBELL: "SOME OF THESE ARE BOSTIC'S SLIPS."

BY THE COURT: "I WOULD LIKE TO KNOW THE ONES THAT WERE FOUND OVER ON GOLETA AVE.? WHAT EXHIBIT IS THAT, PLEASE?"

BY MR. GRIFFITH: "THAT IS STATE'S EXHIBIT 27."

BY THE COURT: "HAVE YOU IDENTIFIED THAT AND STATED WHAT IS IN THAT?"

A. "I believe I have, yes sir."

BY THE COURT: "MEMBERS OF THE JURY, I AM SUSTAINING THE OBJECTION OF COUNSEL FOR THE DEFENDANT IN RESPECT TO THE OFFICER

STATING WHAT IS IN THE EXHIBIT FOUND IN THE CAR ON GOLETA AVENUE FOR THE REASON THAT, IN THE COURT'S OPINION, IS SOME DISTANCE AWAY FROM THE GIANFRANCESCO CAR, AND THE JURY WILL DISREGARD THAT TESTIMONY. THE REST OF THE TESTIMONY IN REGARD TO THE EXHIBITS MAY REMAIN. NOW, MR. NYBELL, YOU WANTED TO SAY SOMETHING?"

BY MR. NYBELL. "THE SAME OBJECTION IS ADDRESSED TO STATE'S EXHIBITS EMBRACING THE SLIPS AND SO FORTH THAT WERE FOUND ON R. J. MANUEL ON OCTOBER 5TH. THERE IS ABSOLUTELY NO EVIDENCE IN THE RECORD—IN FACT, THE EVIDENCE IS ALL TO THE CONTRARY, THAT THE DEFENDANT WAS NEVER AT OR ABOUT OR NEAR THE MANUEL CAR THE DATE THESE ITEMS WERE SEIZED, THEIR ONLY EFFECT BEING TO INCITE PREJUDICE AND INCITE THE PASSION OF THE JURY AND TO ATTEMPT TO INUNDATE THIS DEFENDANT BY DRAGGING IN A HOST OF TOTALLY UNRELATED MATTER, AND I CONSIDER THAT IS HIGHLY PREJUDICIAL."

BY THE COURT: "I PARTLY AGREE WITH COUNSEL FOR THE DEFENDANT. THE CAR ON GOLETA AVENUE IS REMOTE FROM THE GIANFRANCESCO CAR. I AM GOING TO SUSTAIN THE OBJECTION TO THAT EXHIBIT—EXHIBIT 27. THE OTHERS, BEING IN THE IMMEDIATE AREA, I THINK ARE PROPER."

Q. "Can you tell us what those are?"

BY MR. NYBELL: "REFERRING TO WHAT EXHIBIT?"

Q. "Referring to State's Exhibit 24. Can you tell us in a general way what those are?"

A. "This would indicate the number that hit on the stocks and the races in the month of July."

BY MR. GRIFFITH: "I HAVE NO FURTHER QUESTIONS."

CROSS EXAMINATION OF OFFICER THOMAS KELTY

Record. Page 279

Q. "And you weren't present when he was searched at the station on October 5th?"

A. "No sir."

Q. "But do you know that no numbers slips were found on his person? Have you learned that?"

A. "I learned there was no number slips found on his person."

CROSS EXAMINATION OF ANTHONY GIANFRANCESCO

Record. Pages 366-367

Q. "Have you ever heard of a Federal Gambling Stamp?"

BY MR. NYBELL: "I OBJECT TO IT, YOUR HONOR."

BY THE COURT: "YOU MAY ANSWER THAT."

A. "Yes, I heard of it."

Q. "And what are those used for?"

BY MR. NYBELL: "I OBJECT YOUR HONOR."

BY MR. GRIFFITH: "I WILL WITHDRAW THE QUESTION."

Q. "Do you possess a Federal Gambling Stamp?"

BY MR. NYBELL: "I OBJECT, YOUR HONOR."

BY THE COURT: "YOU MAY ANSWER THAT."

BY MR. GRIFFITH: "YOU MAY ANSWER THE QUESTION."

A. "Do I own one?"

Q. "Do you possess a Federal Gambling Stamp?"

A. "Yes, I bought one."

GENERAL CHARGE OF THE COURT

Record. Pages 382-384

"Members of counsel, is there any addition, correction, or omission in respect to the charge? You both have your exceptions to the general charge, of course."

BY MR. GRIFFITH: "I AM COMPLETELY SATISFIED."

BY MR. NYBELL: "THE DEFENDANT IS SATISFIED, YOUR HONOR."

"The jury may now retire to your jury room with the bailiff."

"Jury started to deliberate at 18 minutes to 4:00."

"At 5:35 o'clock P.M., Thursday, June 6, 1963, the following transpired in the Court Room:

BY THE COURT:

"Members of the jury, it is now twenty-five to six. Most everyone, I presume, is getting hungry. At least I eat early. Under the law, you will stay together and, strange as it may seem, you get a free dinner on the county. There are no special instructions. You understand, of course, while you are at dinner, do not discuss the case —any of you, and you will be in charge of the bailiff. Eat by yourselves, and I am going to send the two alternates along as long as they are staying for dinner. You understand you do not participate in the deliberations unless there is disability of some juror. Take your time, enjoy your meal, and when you get back, go to your jury room but do not discuss the case until everyone is present. Do not start the discussions until the twelve jurors are there.

"If you want to roam around for five minutes until I make the necessary arrangements. We will find some place around town where you will have a private dining room so if you will stay on the floor, we will round you up in a few minutes. We will proceed with the deliberations after you have had your dinner."

"Jury went to dinner at 5:45 o'clock P.M., and returned at 7:30 o'clock P.M., to deliberate further."